*THE HONOURABLE Dr. JUSTICE G. YETHIRAJULU

+Writ Petition No.16601 of 1993

% Dated: 23-12-2004.

K.C. Sambasiva Rao**. … Petitioner**

$ Regional Manager, Golconda Region, APSRTC &

another.

… Respondents

! **Counsel for petitioner:** Mr. Kuna Narasimha Rao

^ Counsel for respondents: Mr. V.T.M. Prasad, Standing counsel for A.P.S.R.T.C.

< GIST:

>HEAD NOTE:

? Cases referred:

1. 1968 SLR (SC) 241
2. 1987 (1) SLR 270 (SC)
3. (1997) 7 SCC 443
4. (1998) 3 SCC 321 = 1998 SCC (L & S) 840
5. (2001) 7 SCC 161

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

THURSDAY, THE TWENTY THIRD DAY OF DECEMBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE DR JUSTICE G.YETHIRAJULU

WRIT PETITION NO: 16601 of 1993

Between:

K.C. Sambasiva Rao S/o. Nagabhushanam, 39 years,

Junior Assistant (Material) O/o.Vice-Chairman & Managing

Director, working with Deputy Manager (M) HQ, APSRTC

(Under orders of reversion), Hyderabad (Musherabad)

.... PETITIONER

AND

1. The Regional Manager, Golconda Region, APSRTC, Jubilee Bus Station, Picket, Secunderabd.

2. The Deputy Manager, (Personnel), Golconda Region, APSRTC, Jubilee Bus Station, Picket, Secunderabad.

...RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ, order or direction, particularly in the nature of a writ of mandamus declaring the order No.P6/415(1)/92-GR dated 13-10-1993 of the first respondent as arbitrary, illegal and without jurisdiction.

Counsel for the Petitioner: MR. KUNA NARASIMHA RAO

Counsel for the Respondents : MR.V.T.M.PRASAD (S.C.FOR APSRTC)

The Court made the following:

ORDER:

1. The petitioner is an employee of the respondent Corporation. He

was initially selected as a Comptist through Order P4/502 (6)/88-GR dt.12-6-1989. The first respondent on the basis of the recommendations of the Departmental Selection Committee in the direct recruitment quota appointed him as a Junior Clerk (Purchases). He was posted as an Assistant Store Keeper. He was kept under probation for a period of one year as Junior Clerk (Purchases) w.e.f.

12-6-1989 and was required to pass departmental test for declaration of probation in not more than two chances. It was further mentioned in the order that failure to pass test will render his services liable for termination. The petitioner contends that though he was shown as a Clerk (Purchases), he was discharging the duties of an Assistant Store Keeper in the Materials Department. He was required along with other staff members to attend a probation test on 8-7-1990. He submitted a representation on 7-7-1990 informing the concerned authorities that he cannot attend the test as he was working as an Assistant Stores Keeper and not as a Junior Assistant. The first respondent addressed another letter on 20-4-1991 to attend a test for the Junior Assistants on

21-4-1991. He failed to attend the test on account of receipt of the intimation on 29-4-1991. On 15-5-1991 the petitioner submitted a representation to the second respondent mentioning that he need not attend the test as he was working as an Assistant Stores Keeper in the Materials Division and not as a Junior Clerk (Purchases). On

27-4-1992 the second respondent directed him to appear for the test to be conducted on 17-5-1992. The petitioner without appearing for the said test requested the second respondent to declare his probation without insisting on his appearance for the test on 17-5-1992 on the ground that the persons, including Sri A. Vinod Kumar and S. Ravindranath, who were working as Assistant Stores Keepers (Materials) were given benefit of declaration of probation without passing the departmental test. The petitioner was again directed by the first respondent to appear for the departmental test on 8-11-1992, but he submitted a representation on 27-10-1992 requesting to declare his probation as he completed two years of service. On 3-12-1992 the first respondent issued a notice requiring the

petitioner to show cause as to why his probation in the post of Junior Clerk (Purchases) should not be terminated and why he should not be repatriated to the post of Comptist. The petitioner therefore contends that the impugned order of the first respondent dated 13-10-1993 is illegal, arbitrary and without jurisdiction. Hence the writ petition seeking the relief of mandamus by way of declaring that the impugned order is illegal and arbitrary.

2. The respondents resisted the application through the counter-affidavit and it is briefly as under:

3. The petitioner was appointed as a Junior Assistant (Purchases) from the post of Comptist against direct recruitment under Regulation No.5 of A.P.S.R.T.C. Employees (Services) Regulations. He was kept under probation and was directed to pass the departmental test in not more than two chances for declaration of probation and failure to pass the test will render him for termination. As the petitioner failed to attend the test conducted on 8-7-1990, 21-4-1991, and 8-11-1992 his services in the post of Junior Assistant (Purchases) were terminated through the impugned order. The probation of one
Sri Vinod Kumar was declared only after his passing the test held on
8-11-1992. The orders declaring the probation of Sri Vinod Kumar and Sri S. Ravindranath were cancelled and it was done erroneously and the probation was declared only after their passing the test. The request of the petitioner to allow him to write probation test in the materials cannot be considered since he was appointed as a Junior Assistant (Purchases) with a condition to pass the test in that post. The utilization of the petitioner as an Assistant (Materials) is temporary. The petitioner was relieved on 28-10-1993 whereas he approached the Court subsequently and the Court passed the orders of suspension on
4-11-1993.

4. The petitioner is mainly contending that he was kept under probation for a period of one year and he was required to pass the departmental test within two chances. The departmental tests were not

conducted within the period of probation. There were no orders of extension of probation. He was appointed as a Junior Assistant (Purchases), but he was asked to discharge the duties of Assistant Stores Keeper (Materials), therefore, it became difficult for him to write departmental test conducted for the post of Junior Assistant (Purchases). He therefore contends that since the probation was not extended after the initial period till the date of passing the impugned order, it shall be deemed that his probation has been declared.

5. In the light of the contentions of the parties, the point for consideration is:

Whether the order of the first respondent dated 13-10-1993 is liable to be declared as arbitrary, illegal and without competency?

Point:

6. In the appointment order it was mentioned that he will be under probation for a period of one year and he has to pass the departmental test within two chances to declare his probation. Unless the period of probation is extended or the termination ordered at the end of the initial period by the competent authority, it shall be deemed that the probation is declared after the completion of the period.

7. Regulation No. 21 of the Employees (Recruitment) Regulations, 1966 speaks about the termination or extension of probation. It reads as follows:

21. **Termination or Extension of Probation:**

1. Where probation is prescribed for a post before appointment as a full member of the service, the appointing authority may, at any time before the expiry of such probation—

   i. terminate the probation of a probationer and discharge him from service for want of vacancy;

   ii. at its discretion by order either extend the period of probation of the probationer in accordance with these regulations or terminate his probation and discharge him from service.

2. If within the period of probation, a probationer fails to pass the special tests, if

any, prescribed, the appointing authority shall, by order, discharge him from service unless the period of probation is extended for good and valid reasons to be recorded in writing.

Explanation:

iii. Discharge of probationer means in a case where a probationer is a full member or an approved probationer of another service, class or category, is reversion to such service, class or category, and in any other case dispensing with his service.

iv. If within the period of probation prescribed for a post or within the extended period of probation, as the case may be, probationer has appeared for any such test or for any examination and the result of such test or examination is not known before the expiry of such period, he shall continue to be on probation until the publication of the result of the said test or examination or the first of them in which he fails to pass, as the case may be.

3. If the appointing authority decides that the probationer has failed to work satisfactorily or that the probationer has not made sufficient use of his opportunity, it shall, unless the period of probation is extended in accordance with these regulations, by order discharge him from service.

4. i) At the end of the prescribed or extended period of probation, as the case may be, the appointing authority shall consider the probationer's suitability for full membership of the service, class or category for which he was selected.

ii) The appointing authority shall communicate lapses on the part of the probationer in advance of expiry of the prescribed period of probation.

iii) If the appointing authority decides that a probationer is suitable for such membership, it shall, as soon as possible, issue an order declaring the probationer to have satisfactorily completed his probation. On the issue of such an order, the probationer shall be deemed to have satisfactorily completed his probation on the date of expiry of the prescribed or extended period of probation.

8. The learned counsel for the petitioner relied on a Memorandum dated 23-4-1990 issued by the Managing Director of the respondents Corporation. In the said Memorandum, it was stated as under:

In terms of clause (2) of Regulation 21, if, within a period of probation, a probationer fails to pass the test, if any, prescribed, the appointing authority shall, by an order discharge him from service, unless the period of probation is extended for good and

valid reasons.

9. It was further mentioned in the said Memorandum:

> If the probationers who are required to pass the test are continued beyond the period of two years, there is no alternative than to exempt such probationers from passing the prescribed test and declare their probation even though they are not up to the mark. With a view to tide-over the situation, the Corporation decided that the probationers not only shall be sponsored, but also directed in writing, to appear for the test when conducted within a period of one year. If the candidate passes the said test, his probation may be declared subject to suitability. If he fails in the said test, his probation period may be extended for a further period of six months by an order. Within the extended period, another test shall be conducted again and if the probationer fails in the test for the second time, his probation may be terminated. The Officers of the Corporation may ensure that the probation tests are conducted twice in a year in June and December at Regional level in respect of Junior Assistants (Finance) / Junior Assistants (Personnel) / Personal Assistants / Typists / Junior Assistant (Statistics) / Junior Assistants (Materials) / Junior Assistants (Purchase) depending upon the candidates who appear for the test.

10. The petitioner contends that the respondents did not follow the said Circular to conduct the tests and they conducted the tests as and when they find it convenient.

11. The respondents did not follow the schedule mentioned in the Memorandum and they conducted the tests after the expiry of the period of probation. The respondents did not mention anywhere as to whether the period of probation of the petitioner was extended at any time.

12. In **Director of Public Instruction v. Dharam Singh** the teachers were appointed on one year probation against permanent posts. No orders with regard to their confirmation or extension of probation issued. They were allowed to continue for three years and later they were terminated. In the above factual backdrop the Supreme Court held:

> Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October1, 1960. After such confirmation, the authority had no power to dispense with their services under Rule 6 (3) on the ground that their work or conduct during the period of probation

was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their post. The impugned orders deprived them of this right and amounted to removal from service by way of punishment. The removal from service could not be made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of Article 311 of the Constitution. As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of the Article 311 was violated, the impugned orders were rightly set aside by the High Court.

13. In **State of Gujarat v. A. C. Bhargav** the first respondent was appointed to the Indian Police Service on 4-7-1969 and has been discharged from service on 4-7-1969. One of the questions before the Supreme Court was whether the respondent should have been treated as a confirmed officer of the cadre at the time the order of discharge was made. The first respondent placed reliance of Rule 3 (1) of the Indian Police Service (Probation) Rules, 1954, which reads as follows:

> Every person recruited to the service in accordance with Indian Police Service (Appointment by Competitive Examination) Regulations, 1955, … shall be appointed to the service on probation for a period of two years.

14. At the relevant time, sub-rule (3) of the said Rules provided that the Central Government may, if it so thinks fit in any case or class of cases extend the period of probation. The respondent's probation was not extended. Administrative instructions were issued by the Ministry of Home Affairs, Government of India, on 16-3-1973, indicating the guidelines to be followed regarding the period of probation, and the relevant portion thereof reads as under:

> (ii) It is not desirable that a member of the service should be kept on probation for years as happens occasionally at present. Save for exceptional reasons, the period of probation should not therefore be extended by more than one year and no member of the service should, by conversion, be kept on probation for more than double the normal period i.e., four years. Accordingly, a probationer, who does not complete the probationers' final examination within a period of four years, should ordinarily be discharged from the service.

15. In the above factual backdrop, the Supreme Court held that probation after expiry of the prescribed period of four years stands automatically confirmed. Subsequent discharge of an employee from service is violative of Article 311 of the Constitution of India.

16. A similar issue came up for consideration before the Supreme Court in **Dayaram Dayal v. State of M.P.**. In the said case, the issue was whether the candidate could be considered on probation when he had been continued in service beyond the maximum period of probation prescribed in the recruitment rules.

17. Rule 24 (1) of the M.P. Judicial Services (Classification, Recruitment and Conditions of Services) Rules, 1995 is as follows:

> Every candidate appointed to the cadre shall undergo training for a period of six months before he is appointed on probation for a period of two years which may be extended for a further period of not exceeding two years. The probationers may, at the end of the period of their probation, be confirmed subject to their fitness for confirmation and to having passed by the higher standard, all such departmental examination as may be prescribed.

18. Rule 24 (3) of the Rules reads as follows:

> If during the period of probation he has not passed the prescribed departmental examinations or has been found otherwise unsuitable for the service, the Governor may at any time therefore dispense with his service.

19. The appellant in the above case was appointed as a Civil Judge Class II in Madhya Pradesh Subordinate Judicial Service by an order dated 22-10-1985. There were reports about his unsatisfactory performances and therefore the State Government on the recommendation of the High Court terminated the appellant's services vide order dated 8-11-1993 by paying one month's salary in lieu of notice period. The appellant's contention was that maximum period of probation prescribed in Rule 24 was four years and therefore as on 8-11-1993 he could not be treated on probation and therefore he was

deemed to have been confirmed. Accepting his plea the Supreme Court held as follows:

> Rule 24 does not merely fix a period of probation but also fixes a maximum period beyond which the probation cannot be continued. An examination of the rulings of the Supreme Court on the question of probation and confirmation shows that in some cases the Supreme Court has held that mere continuation beyond the period of probation does not amount to confirmation unless the order of appointment or the rule contains a deeming provision, while in some other cases, it has been held that in certain exceptional situations, it is permissible to hold that services must be deemed to be confirmed. There is no real conflict between two sets of decisions and it depends on the conditions contained in the order of appointment and the relevant rules that are applicable. (paras 6 and 7)
>
> In first line of cases, it has been held that if in the rule or order of appointment, a period of probation is specified and a power to extend probation is also specified and the officer is continued beyond the prescribed period of probation, he cannot be deemed to be confirmed. In such cases, there is no bar against termination after the expiry of the initial period of probation. The other line of cases are those where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the candidate concerned is deemed to have been confirmed on expiry of maximum period of probation. Even in such type of cases, there may be special provision in the relevant rules to negative such inference. (paras 8, 9 and 12)
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> In the present case, Rule 24 has prescribed an initial period of probation and then for the extension of probation subject to a maximum. This case therefore squarely falls within the second line of cases. The provision for a maximum is an indication of an intention not to treat the officer as being under probation after the expiry of the maximum period of probation. In the present case, the effect of the rule fixing a maximum period of probation is not whittled down by any other provision in the rules.

20. In **Wasim Beg v. State of U.P.** a person was selected for appointment as Divisional Manager by U.P.State Leather Development and Marketing Corporation Limited under the Model Service Rules for State Enterprises, which were adopted by the said Corporation. In the said case no maximum period of probation was prescribed either by the letter of appointment or the Rules. *The Rules laid down that an employee shall be deemed to have become a confirmed employee after he has successfully completed the period of probation*. From the affidavit filed by

the Corporation as well as from the report of the Managing Director, it was clear that the incumbent was considered by the Board as having satisfactorily completed his period of probation on 9-1-1979 i.e. before expiry of one-year period of probation and was considered as a regular employee from 10-1-1979. From the affidavit filed by the Corporation it was clear that the services of the incumbent were satisfactory for the first few years and work was very good and only thereafter his work deteriorated as a result of which the Corporation suffered losses. Thus in view of the stand taken that the incumbent had successfully completed the period of probation, he was deemed to have become a confirmed employee, as enumerated in the Rules referred to above.

21. In **High Court of M.P. v. Satya Narayan Jhavar** a three Judge Bench of the Supreme Court by over-ruling **Dayaram Dayal's** case (3 supra) held as follows:

> **11.** The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject-matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.

22. In the above case, the Supreme Court further held as follows:

> **35.** In the case on hand, correctness of the interpretation given by this Court to Rule 24 of the Rules in the case of *Dayaram Dayal*[1] is the bone of contention. In the aforesaid case, no doubt, this Court has held that a maximum period of probation having been provided under sub-rule (1) of Rule 24, if a probationer's service is not terminated and he is allowed to continue thereafter it will be a case of deemed confirmation and the sheet anchor of the aforesaid conclusion is the Constitution Bench decision of this Court in the case of *Dharam Singh*[2]. But, in our considered opinion in the case of *Dayaram Dayal*[1] Rule 24 of the Rules has not been interpreted in its proper perspective. A plain reading of different sub-rules of Rule 24 would indicate that every candidate appointed to the cadre will go for initial training for six months whereafter he would be appointed on probation for a period of 2 years and the said period of probation would be extended for a further period not exceeding 2 years. Thus, under sub-rule (1) of Rule 24 a maximum period of 4 years' probation has been provided. The aforesaid sub-rule also stipulates that at the end of the probation period the appointee could be confirmed subject to his fitness for confirmation and to his having passed the departmental examination, as may be prescribed. In the very sub-rule, therefore, while a maximum period of probation has been indicated, yet the question of confirmation of such a probationer is dependent upon his fitness for such confirmation and his passing of the departmental examination by the higher standard, as prescribed. It necessarily stipulates that the question of confirmation can be considered at the end of the period of probation, and on such consideration if the probationer is found suitable by the appointing authority and he is found to have passed the prescribed departmental examination then the appointing authority may issue an order of confirmation. It is too well settled that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the Rules governing the question of confirmation subject to a finding that the probationer is in fact fit for confirmation. This being the position under sub-rule (1) of Rule 24, it is difficult for us to accept the proposition, broadly laid down in the case of *Dayaram Dayal*[1] and to hold that since a maximum period of probation has been provided thereunder, at the end of that period the probationer must be held to be deemed to be confirmed on the basis of the judgment of this Court in the case of *Dharam Singh*[2].

23. In the light of the above legal position, I wish to consider the validity of the order in question.

24. In all the representations the petitioner contended that he completed three years service as an Assistant Store Keeper without any blemish, therefore, he is deemed to have completed the period of probation satisfactorily in accordance with the Memorandum dated

28-4-1990 read with the provisions of the Recruitment Regulations, 1966 and requested to issue an order that he is deemed to have completed the period of probation satisfactorily w.e.f. 7-7-1990 in the interest of justice. On 13-10-1993 the impugned order was issued by the first respondent mentioning that the petitioner failed to attend the probation test instead he submitted representations for declaration of probation stating that he completed three years of service and probation has to be declared on completion of two years in terms of Regulation No.20 of A.P.S.R.T.C. Recruitment Regulations, 1966. In the impugned order it was further mentioned that in terms of Regulation 20, the maximum period of probation is two years for the purpose of continuous duty for counting one year period, if the probationer fails to pass the test within the period of probation in two chances, he will be discharged from the service. Since the petitioner failed to attend the test conducted on 8-7-1990 and 25-4-1991 and lost the two chances given, he is liable for repatriation as a Comptist. It was further mentioned in the impugned order that since the explanation given by the petitioner is not satisfactory, the services of the petitioner as a Junior Assistant (Purchases) were terminated with immediate effect and repatriated to the former post of Comptist.

25. The substantive post of the petitioner is Junior Assistant (Purchase). He joined duty on 7-7-1989. He was posted as an Assistant Store Keeper and was working in that capacity since then. He completed the probation period by 6-7-1990. During the said period of probation no test was conducted to the petitioner. The test was conducted on 8-7-1990 i.e., after one year period of probation. There was no order extending the period of probation. As per the wording used by the Managing Director of the Corporation in the Memoradum dated 23-4-1990, the Corporation was exempting the probationers from passing the prescribed test due to non-conducting of the probation tests during the currency of the probation period. Therefore, the Corporation was declaring their probation even though they do not pass the test. Hence, the Managing Director reminded the concerned authorities to ensure conducting of probation tests twice in a year in June and December respectively. Though the legal position is to

the effect that a probationer is liable to be terminated from service for not passing the probation test during the period of probation, the respondents failed to conduct the probation test during the currency of the probation period, therefore, the petitioner is entitled for the benefit of the same. The respondents neither terminated the service of the petitioner before the expiry of the period of probation nor extended the probation period. The respondents having failed to conduct the probation test during the period of probation of one year did not choose to pass any orders extending the period of probation. Though the petitioner did not pass the test on any subsequent date, he is entitled to be declared as an approved probationer on account of the latches on the part of the respondents in not conducting the test during the currency of the probation period. The petitioner is therefore entitled to be declared as an approved probationer w.e.f. 7-7-1990.

26. So far as the monitory benefit is concerned, since the petitioner did not pass any test till this date, I am not inclined to give any monetary benefit for the period from 7-7-1990 till the date of this order. The above period shall be counted for all other purposes, and the petitioner is entitled for the monetary benefit only from the date of this order.

27. In the result, the writ petition is allowed. The impugned order of the first respondent dated 13-10-1993 is set aside. The petitioner is directed to be treated as an approved probationer in the post of Junior Assistant (Purchase) w.e.f. 7-7-1990 with consequential benefits, as indicated above. No order as to costs.

_____

(Dr.G.Yethirajulu, J)

23rd December 2004

Note:

L.R. copy be marked.

(By order)

Svs

That Rule Nisi has been made absolute as above.

Witness the Hon'ble Sri Devinder Gupta, the Chief Justice on this the 23rd day of December Two thousand and four.

ASSISTANT REGISTRAR

// TRUE COPY //

SECTION OFFICER

To

1. One fair copy to the Honourable Dr.Justice G. Yethirajulu (for his Lordship's kind perusal)
2. The Regional Manager, Golconda Region, APSRTC, Jubilee Bus Station, Picket, Secunderabd.
3. The Deputy Manager, (Personnel), Golconda Region, APSRTC, Jubilee Bus Station, Picket, Secunderabad.
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